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No. 94-1837

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,
Petitioner,

v.

TOM GALLAGHER, INSURANCE COMMISSIONER OF THE STATE OF FLORIDA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF AMICUS CURIAE FLORIDA BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Florida Bankers Association is a trade association representing over ninety per cent of the commercial deposits and over eighty per cent of the banks in Florida. For more than a decade, the Florida Bankers Association has been actively involved in the representation of Florida financial institutions with respect to the impact of state statutes on the sale and distribution of insurance products. The issues in this case affect its members directly. It appeared as *amicus curiae* in *Glendale Federal Savings and Loan Association v. State of Florida, Department of*

Insurance, 587 So. 2d 534 (Fla. 1st DCA 1991), *review denied*, 599 So. 2d 656 (Fla. 1992), and as petitioner in the administrative proceedings challenging the promulgations of rules purporting to implement section 626.988, Florida Statutes, *State, Department of Insurance v. Great Northern Annuities*, 1995 WL 492956, 20 Fla. L. Weekly D1928 (Fla. 1st DCA August 21, 1995).

Florida Bankers Association also appeared as *amicus curiae* in this action before the Eleventh Circuit.

All parties to this proceeding have consented to the filing of this brief. The written consents are filed herewith.

STATEMENT OF THE CASE AND OF THE FACTS

Amicus Curiae Florida Bankers Association adopts the Statement of the Case and the Statement of the Facts of Petitioner Barnett Bank of Marion County, N.A.

SUMMARY OF THE ARGUMENT

Florida Statutes section 626.988 is an anti-affiliation statute which prohibits agents licensed by the Department of Insurance from engaging in insurance agency activities in association with financial institutions. It was enacted for the sole purpose of prohibiting financial institutions (as that term is defined in the statute) from participating in the distribution chain of insurance products. It was not enacted for the purpose of managing, adjusting or controlling the relationship between the insurance company and its policy holders, the "business of insurance" as that term is understood in the application of the McCarran-Ferguson Act's negative preemption.

The Florida statute was passed in response to federal administrative proceedings which had the potential effect of allowing financial institutions to compete directly with insurance agencies in the marketing of insurance products. The legislative history surrounding the introduction

and the passage of the statute unequivocally characterizes the purpose of the statute as being to prevent financial institutions from selling insurance to the public because they might engage in coercive marketing and unfair trade practice or create an undue concentration of economic resources.

The Florida appellate court recognized these three elements as the controlling purpose of the statute. When financial institutions seeking to exercise agency powers challenged the constitutionality of the statute, the Florida First District Court of Appeal accepted the arguments of the Department of Insurance and held that the police power of the state was rationally exercised to prevent coercion, unfair trade practices and undue concentration of economic resources. The regulation of financial institutions was the sole purpose asserted for the statute. The regulation of the business of insurance was never raised as a justification for the statute.

Indeed, the Department of Insurance itself acknowledged the purpose and scope of the statute by recognizing that the ownership and control of an insurance company by a financial institution did not run afoul of the prohibitions of section 626.988, but the control of an insurance agent by a financial institution was a direct violation of the statute.

Faced with the challenge of Barnett Bank of Marion County, N.A.'s exercise of the banking powers granted under 12 U.S.C. § 92, the Department has had to develop a new theory of the purpose of the statute—one which would bring section 626.988 within the shelter of McCarran-Ferguson. The only argument that the Department has been able to develop is the hypothesis that financial institutions will ultimately control insurers, by virtue of the financial institutions' control of the insurance market. The argument defies logic and economic reality. The presence of financial institutions within the distribution stream of insurance products can only increase competition among marketers, thus minimizing the ability of any

group, be it agents or agencies or financial institutions, to exercise monopsony power over the market. Moreover, Florida's insurance code contains a number of statutes, unrelated to section 626.988, which effectively prevent the danger the Department projects.

The Department's newly minted analysis of the legislative purpose of section 626.988 cannot change the fact that the statute was neither intended nor crafted to regulate the business of insurance. Rather it was another salvo in the never-ending battle to erect insurmountable barriers between financial institutions and the marketing of insurance products.

McCarran-Ferguson does not save from preemption statutes enacted to preserve the insurance market for agents. Section 626.988 serves no other purpose.

ARGUMENT

> "Section 626.988 has generally served to limit the activities of financial institutions in the marketing of insurance . . . ."
>
> —Donald A. Dowdell
> Director of Insurance Services
> [R5-36]

I. SECTION 626.988 WAS NEVER INTENDED TO REGULATE THE BUSINESS OF INSURANCE BUT RATHER TO PROTECT THE PUBLIC FROM THE ALLEGEDLY OVERREACHING ACTIVITIES OF FINANCIAL INSTITUTIONS.

Federal law, specifically 12 U.S.C. § 92, authorizes national banks to sell insurance in towns with populations of less than 5000. Florida's anti-affiliation statute, section 626.988, excludes financial institutions from the distribution chain of insurance products in Florida. Clearly, 12 U.S.C. § 92 would preempt Florida Statute section 626.988, but for the effect of the McCarran-Ferguson Act.

The McCarran-Ferguson Act, 15 U.S.C. § 1012(b), exempts from preemption those state statutes which are

enacted "for the purpose of regulating the business of insurance." The scope of that exemption is not coextensive with the commerce of insurance, however. This Court defined the parameters of the exemption in *Securities and Exchange Commission v. National Securities. Inc.*, 393 U.S. 453 (1969):

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities **of insurance companies** relate so closely to their status as reliable insurers that they must be placed in the same class. But whatever the exact scope of the statutory term, **it is clear where the focus was—it was on the relationship between the insurance company and the policy holder.** Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the business of insurance.

Id. at 460 (emphasis added).

This gloss, specifically as applicable to the first clause of 15 U.S.C. § 1012(b), was further refined in *United States Department of the Treasury v. Fabe*, 508 U.S. ——, 113 S. Ct. 2202 (1992). This Court rejected the notion that the "business of insurance" in that context was limited to the writing of the contract; rather, it included the performance of the insurance contract:

> The broad category of laws enacted "for the purpose of regulating the business of insurance" consists of laws that possess the "end, intention or aim" of **adjusting, managing, or controlling** the business of insurance. Black's Law Dictionary 1236, 1286 (6th ed. 1990). This category necessarily encompasses more than just the "business of insurance." For the reasons expressed above, we believe that the actual performance of an insurance contract is an essential part of the "business of insurance."

Id., 113 S. Ct. at 2210 (emphasis added).

Certainly, McCarran-Ferguson does not protect from preemption a statute which was enacted for a purpose **other than** the regulation of insurance.

Section 626.988, Florida Statutes, prohibits insurance agents from working for or with financial institutions:

> (2) No insurance agent or solicitor licensed by the Department [of Insurance] who is associated with, under contract with, retained by, owned or controlled by, to any degree, directly or indirectly, or employed by, a financial institution shall engage in insurance agency activities as an employee, officer, director, agent, or associate of a financial institution agency.

The legislative and judiciary history of this statute unmistakably reveals that the purpose for which the statute was enacted was "to limit the activities of financial institutions in the marketing of insurance . . . ." as specifically stated by Donald A. Dowdell in the hearing before the trial court. [R5-36] It was not enacted "for the purpose of regulating the business of insurance" as that phrase is used in the McCarran-Ferguson Act.

A. Section 626.988 Was Enacted for the Purpose of Eliminating Banks From the Distribution Chain of Insurance Products and Not for the Regulation of Insurance.

The legislative history of section 626.988 shows unequivocally that the statute was enacted for the purpose of building an insurmountable barrier between financial institutions and insurance agents' business of marketing insurance.

In 1974, when section 626.98 was enacted, a case was wending its way through the federal administrative procees which had the potential of opening the **marketing** of insurance (as opposed to the business of insurance) to financial institutions. That proceeding, summarized in *Florida Association Insurance Agents, Inc. v. Board of*

Governors of the Federal Reserve System, 591 F.2d 334 (5th Cir. 1979), arose when Barnett Bank of Florida, Inc., and other financial institutions sought the Federal Reserve Board's approval to sell insurance. Insurance agents strongly resisted banks' entry into the distribution of insurance. After a lengthy and complex hearing, an administrative law judge recommended that the application be approved with certain conditions—that the financial institutions' insurance forms contain anticoercion statements and that the financial institutions be allowed to market insurance *only where they controlled less than fifteen percent of the* banking *market*. The administrative law judge found that there were potential adverse effects from granting the applications. Among those was an increased (but not necessarily "undue") concentration of market power which would, in turn, "decrease competition within the insurance industry." 591 F.2d at 340. This anti-competitive effect would potentially reduce the "opportunities for individual entrepreneurs." *Id.* at 341.

In order to circumvent the effect of that recommended ruling, Representative Hyatt Brown (himself a principal in a large insurance agency) and others introduced before the Florida Legislature "A bill to be entitled An act relating to insurance; creating § 626.988 Florida Statutes; . . ." [App. B] The Preamble to that bill recited the procedural status of the applications and the administrative law judge's recommendation, then went on to quote from his findings:

> a) ". . . [T]he entry of large banking institutions into the insurance agency business in areas where the banks have a large concentration of resources would result in the demise of small insurance agencies or their transformation into large combinations. This would decrease competition within the insurance industry and reduce the opportunity for youths, veterans and women to gain a foothold in which [here a word is scratched out and the following word

substituted] ultimately they could participate as owners or managers."

b) ". . . [W]hile there is a minor convenience in bank affiliated insurance agency sales in the case of personal lines such as automobile and homeowner's coverages, the convenience advantage in the case of commercial financing-insurance appears insignificant."

c) ". . . [I]t appears that the gains in efficiency [by] the bank affiliated insurance agencies will largely benefit the applicants in terms of larger-scale operating economies," and "based upon their record of maximum charges for credit life insurance it is not reasonable to expect that the applicants will voluntarily lower premiums in other fields of insurance."

d) ". . . [W]hile it is difficult to accurately measure the psychology of voluntary tieing, nevertheless the weight of evidence [suggests the possibility of coercion in the sale of insurance to depositors]."

e) ". . . [S]ince banks are predominantly the depositaries [sic] of 'other peoples' money, therefore they should not be in competition with their depositors."

The bill then summarized the purpose and the authority for the enactment:

> WHEREAS, the undue concentration of economic resources, a substantial decrease in competition among *insurance agents*, unfair competition, conflicts of interest and voluntary tieing are against the public policy of the state and against the best interests of the people of Florida, and
>
> WHEREAS, the United States Congress by the Federal Bank Holding Act of 1956, 12 USCA § 1846, specifically reserved to the states the power and authority to enact legislation *with respect to bank holding companies*. . . .

(Emphasis added)

Two points are notable: First, the legislature recognized that section 626.988 was an act regulating bank holding companies and other financial institutions. The coercion ostensibly to be prevented was coercion by the financial institution. The unfair trade practices which the statute prevents are those which the financial institution could impose upon its customers to enhance the benefit to the financial institution. The concentration of economic resources feared was, according to the administrative law judge, the expansion of the financial institution's market.

Second, no issue of financial institution control over insurers was presented to the Legislature. That specter, which formed the bulk of the Department's justification for the statute before the trial court, is a chimera of recent creation.

B. The Judicial Interpretation of the Purpose and Function of Section 626.988 Demonstrates That the Statute Was Enacted to Regulate the Activities of Financial Institutions Rather Than the Business of Insurance.

In the mid-1980's, financial institutions challenged the constitutionality of section 626.988 on grounds of vagueness, violation of due process, violation of equal protection and federal preemption. *Glendale Federal Savings & Loan Association v. Department of Insurance*, 485 So. 2d 1321, 1322 (Fla. 1st DCA), *review denied*, 494 So. 2d 1150 (Fla. 1986). In upholding the constitutionality of the statute, *Glendale Federal Savings and Loan Association v. Department of Insurance*, 587 So. 2d at 534, the district court of appeal approved the trial court's delineation of the legislative purpose of the statute: prevention of coercion, unfair trade practices, and undue

concentration of economic resources **by financial institutions.** *Id.* at 536, n.1.

In essence, the court confirmed the preamble to the statute as it was passed. The court's interpretation of the purpose of the statute was limited to preventing financial institutions from exercising undue influence over their own customers or from cornering the insurance **sales** market.

Significantly, a review of the Judge Zehmer's dissenting opinion shows that the Department itself relied on the state's police power to regulate the relationship between the financial institution and its customers as the sole justification for the statute! [1]

C. The Department Itself Interpreted the Statute as Regulating the Relationship Between Financial Institutions and Agents Rather Than the Business of Insurance.

At about the same time that Glendale Federal Savings and Loan Association was mounting its attack on the constitutionality of section 626.988, the Department of Insurance was asked to comment on the relationships between financial institutions and insurers which were not prohibited by the statute.

In 1985, American Pioneer Savings Bank requested an opinion from the Department as to whether the fact that American Pioneer Life Insurance Company was a wholly owned subsidiary of American Pioneer Savings Bank violated the anti-affiliation statute. The Department found absolutely no conflict between section 626.988 and a financial institutions' **direct** ownership and control of an insurer.

> . . . In view of the fact that American Pioneer Savings Bank is the ultimate parent of American Pioneer Life Insurance Company, the specific issue which must be resolved in responding to your inquiry is **whether an independent agent appointed by American Pioneer Life is directly or indirectly associated with, or retained, controlled, or employed by American Pioneer Savings Bank. Absent such a relationship, Section 626.988 does not prevent American Pioneer Life and its agents from marketing insurance in this state.**
>
> . . . These corporate relationships in and of themselves do not create a prohibited relationship between American Pioneer Savings Bank and independent insurance agents appointed by American Pioneer Life.
>
> . . . It is recognized that as the corporate parent, American Pioneer Savings Bank may influence or control various corporate activities of its subsidiaries **which would not entail control of the solicitation, effectuation and servicing of coverage by insurance agents. If, in fact, American Pioneer Savings Bank does not directly or indirectly control the conduct of insurance activities by American Pioneer Life agents but, instead, the agents sell insurance free of influence from the financial institution, the prohibitions of the statute are inapplicable.**

[R5—82-83; Department of Insurance Exhibit 1 at 12-13, filed separately in the Record] (emphasis in bold added; underlining in Department of Insurance Exhibit 1).

The sole legislative purpose the Department recognized in 1986, more than a decade after the enactment of section 626.988, clearly related to the ability of the finan-

[1] Notably, the Department argued in that proceeding that section 626.988's exemption from the prohibitions of the statute of those banks located in cities having a population not in excess of 5,000 is "the same as that passed by Congress in its 1916 amendment to the 1864 National Banking Act, codified as 12 U.S.C. § 92." *Id.* at 538. Further, according to Judge Zehmer's dissent, "Not only is the purpose of the federal exemption consistent with the purposes of the Florida exemption, appellees [Department of Insurance] argue, federal preemption would preclude the application of the Florida statutory prohibition to federally chartered banks falling in this category." *Id.*, (emphasis added).

cial institution to control the **marketing** of the insurance, the "solicitation, effectuation and servicing of coverage," by agents. The relationship prohibited by section 626.988, according to the Department at that time, was solely the relationship between the financial institution and the agent.

II. THE DEPARTMENT'S ATTEMPT TO BRING SECTION 626.988 WITHIN THE PROTECTION OF McCARRAN-FERGUSON IS ILLOGICAL AND UNSUBSTANTIATED IN FACT OR IN ECONOMIC THEORY. IT MERELY CONTINUES ECONOMIC PROTECTIONISM FOR AGENTS AND DOES NOT REGULATE THE BUSINESS OF INSURANCE.

Section 626.988 exists solely to prevent financial institutions from competing with independent agents in the field of insurance marketing. The Department is charged by law with implementing and defending this legislative purpose. When faced with Barnett Bank of Marion County, N.A.'s exercise of rights granted it under 12 U.S.C. § 92, the Department recognized McCarran-Ferguson as its only refuge. In spite of the legislative, administrative and judicial history of the statute, the Department had to cut its suit before the trial court to fit the cloth of this Court's definition of "the business of insurance" set forth in *Securities and Exchange Commission*, and *Fabe*. Unfortunately, the suit does not fit the facts, the law, or the Department's own actions.

The Department attempted to rationalize the economic protectionism of section 626.988 as necessary to the protection of the consumer [R5—22-23, 78], thus regulating the relationship between the **insurer** and the **policyholder** and bringing section 626.988 within the ambit of the judicial definition of "regulating the business of insurance." One Department witness hypothesized the potential for a conflict of interest "if the financial institution derives income from the sale of insurance by the insurance agent." [R5—23] The astounding, illogical, and entirely unsubstantiated premise underlying this hypothesized conflict of interest is that the financial institution would "control" the insurer by virtue of the volume of business the individual financial institution would be able to provide.

> So when they [the financial institution] get control of the insurer, because they control so much of its volume, and they make money based on per transaction and per volume, they are motivated to see the volume and the per transaction counts pressed way up, and that's what controls the insurance, insurer's decision making, not the traditional proper insurance company's criteria, is this a good risk, does this risk fit our established actuarial projections on which our rates are based.

[R5-67] What is not explained, and cannot be, is what market force prevents the insurer from marketing through other agents, agencies or financial institutions. The Department's parade of horribles can exist **only in a closed market!** Yet the very entry of financial institutions into the distribution chain opens, rather than restricts, the market.

Most interestingly, the Department ignores the fact that financial institutions have lawfully marketed certain insurance products in the state of Florida, *e.g.*, credit life insurance; that the statute excludes certain other financial institutions from the prohibitions of the statute, *e.g.*, credit unions; and that since the mid-1980's, agents have marketed annuities on financial institution premises with the Department's authorization. Insurers, financial institutions, agents and the public of the state of Florida have all survived the long and varied history of this lawful association between insurance agents and financial institutions virtually unscathed. The argument of the Department overlooks and is inconsistent with the fact that financial institutions have been engaged in the sale of insurance for over 20 years and are currently permitted to do so in 22 states.

In addition, Mr. Dowdell, Director of Insurance Services for the Department, testified to the existence of a number of other statutes in Florida's Insurance Code, section 626.7491, section 628.801, the Third Party Administrator Statute, Chapter 626, Part VII, section 626.9451, section 626.955, and section 626.9551, which effectively prevent the hypothesized potential abuse. [R5—28-35, 47-51]

The Department's inventive and imaginative justification for treating section 626.988 as a statute regulating the business of insurance is completely belied by the reality which surrounded the birth of this law and the interpretation that the Department and the agents have consistently given it.

McCarran-Ferguson was not enacted to preserve economic opportunity for any segment of commercial endeavor. Absent a legislative purpose to regulate the business of insurance, section 626.988 is not entitled to the negative preemption of the Act. Nothing in the testimony of either Department witness relates the recognized legislative purposes of prevention of coercion, prevention of unfair trade practices or the prevention of undue concentration of economic resources, to the " 'end, intention or aim' of adjusting, managing or controlling the business of insurance," *Fabe*, 113 S. Ct. at 2210, or the relationship between the insurer and the policy holder. *Securities & Exchange Commission*, 393 U.S. at 460. In light of the written legislative history, the judicial interpretation of the legislative purpose, and the Department of Insurance's own implementation of the statute so as to exclude financial instiutions from the distribution chain of insurance products, section 626.988 cannot be held to be a law enacted for the purpose of regulating the business of insurance.

CONCLUSION

For the reasons set forth above, amicus curiae Florida Bankers Association respectfully urges the Court to reverse the decision of the Eleventh Circuit Court of Appeals in this cause.

Respectfully submitted,

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November 8, 1995

APPENDICES

APPENDIX A

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

Case No. 92-4332RP

GREAT NORTHERN INSURED ANNUITY CORPORATION,
Petitioner,

vs.

DEPARTMENT OF INSURANCE AND TREASURER,
Respondent.

Case No. 92-4333RP

FIRST UNION MORTGAGE CORPORATION,
Petitioner,

vs.

DEPARTMENT OF INSURANCE AND TREASURER,
Respondent.

Case No. 92-4334RP

FLORIDA BANKERS ASSOCIATION,
Petitioner,

vs.

DEPARTMENT OF INSURANCE AND TREASURER,
Respondent.

Case No. 92-4335RP

ASSOCIATION OF BANKS IN INSURANCE, INC.,
Petitioner,

vs.

DEPARTMENT OF INSURANCE AND TREASURER,
Respondent.

Case No. 92-4336RP

FLORIDA ASSOCIATION OF LIFE UNDERWRITERS,
Petitioner,

vs.

DEPARTMENT OF INSURANCE AND TREASURER,
Respondent.

Case No. 92-4347RP

JAMES MITCHELL & COMPANY and
JMC INSURANCE SERVICES CORPORATION,
Petitioner,

vs.

DEPARTMENT OF INSURANCE AND TREASURER,
Respondent.

Case No. 92-4351RP

FLORIDA CENTRAL CREDIT UNION, RAILROAD and INDUSTRIAL FEDERAL CREDIT UNION, GTE FEDERAL CREDIT UNION and CREDIT UNION SERVICES, INC.,
Petitioner,

vs.

DEPARTMENT OF INSURANCE AND TREASURER,
Respondent.

Case No. 92-4352RP

FLORIDA ASSOCIATION OF INSURANCE AGENTS,
Petitioner,

vs.

DEPARTMENT OF INSURANCE AND TREASURER,
Respondent.

Case No. 92-6735RP

FLORIDA ASSOCIATION OF LIFE UNDERWRITERS,
Petitioner,

vs.

DEPARTMENT OF INSURANCE AND TREASURER,
Respondent.

Case No. 92-6736RP

BARNETT BANKS TRUST COMPANY, N.A.,
BARNETT BANKS INSURANCE, INC. AND
BTI SERVICES, INC.,
Petitioners,

vs.

DEPARTMENT OF INSURANCE AND TREASURER,
Respondent.

Case No. 92-6737RP

FIRST NATIONWIDE BANK, A FEDERAL SAVINGS BANK,
Petitioner,

vs.

DEPARTMENT OF INSURANCE AND TREASURER,
Respondent.

Case No. 92-6760RP

MARKETING ONE, INC.,
Petitioner,

vs.

DEPARTMENT OF INSURANCE AND TREASURER,
Respondent.

Case No. 92-6762RP

LIBERTY SECURITIES CORPORATION,
Petitioner,

vs.

DEPARTMENT OF INSURANCE AND TREASURER,
Respondent.

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Mary Clark, held a formal hearing in the above-styled cases on December 14-22, 1992, in Tallahassee, Florida.

* * * *

STATEMENT OF THE ISSUES

The basic issue for determination is whether proposed Rules 4-223.001-.011, as promulgated June 26, 1992 and amended October 16, 1992, and thereafter, constitute an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On June 26, 1992, the Department of Insurance published a new rule chapter implementing the provisions of section 626.988, Florida Statutes, and other statutes. Petitions challenging the rules were timely filed by Great Northern Insured Annuity Corporation (DOAH Case No. 92-4332RP), First Union Mortgage Corporation (DOAH Case No. 92-4333RP), Florida Bankers Association (DOAH Case No. 4334RP), Association of Banks in Insurance (DOAH Case No. 92-4335RP), Florida Association of Life Underwriters (DOAH Case No. 92-4336RP), James Mitchell & Company and JMC Insurance Services Corporation (DOAH Case No. 92-4347RP), The Minnesota Mutual Life Insurance Company (DOAH Case No. 92-4350RP), Florida Central Credit Union and Credit Union Services, Inc. (DOAH Case No. 92-4351RP) and Florida Association of Insurance Agents (DOAH Case No. 92-4352RP). The cases were consolidated by Order of the Hearing Officer.

On October 6, 1992, the Department published a Notice of Change which materially altered the rule chapter. Subsequently, Florida Association of Life Underwriters filed a new petition (DOH Case No. 92-6735RP). Barnett Banks Trust Company, N.A., Barnett Banks Insurance, Inc., and BTI Services, Inc. (DOAH Case No. 92-6736RP), First Nationwide Bank (DOAH Case No. 92-6737RP), American Bankers Insurance Co. and American Bankers Life Assurance Co. (DOAH Case No. 92-6738RP), Marketing One, Inc. (DOAH Case No. 92-6760RP), Florida League of Financial Institutions (DOAH Case No. 92-6761RP), and Liberty Securities

Corporation, (DOAH Case No. 92-6762RP) filed petitions to challenge the rules. In addition, California Federal Bank, Financial Institutions Insurance Association, Compulife, Inc., and the Florida Department of Banking and Finance were granted leave to intervene. All proceedings were consolidated.

The Department filed a Motion for Partial Summary Final Order that subsection (8) of section 626.988, F.S. had not been triggered. Great Northern Insured Annuity Corporation and James Mitchell and Company filed cross motions for Partial Summary Final Order that the subsection *had* been triggered and that state banks are thereby authorized to sell annuities in the state. The Department's motion was denied and the Petitioners' motions were granted, in an order entered on December 4, 1992.

The formal hearing was conducted from December 14 through December 22, 1992, with an opportunity for all parties to present exhibits and witnesses. Prior to and during the hearing, stipulations and changes in the rules resolved the issues raised in the petitions of Minnesota Mutual, (DOAH Case No. 92-4350RP), American Bankers Insurance Co. and American Bankers Life Assurance Co. (DOAH Case No. 92-6738RP) and Florida League of Financial Institutions, Inc. (DOAH Case No. 92-6761). Those cases were voluntarily dismissed.

The transcript was filed on March 8, 1993. Proposed final orders were filed on April 7, 1993.

FINDINGS OF FACT

Parties

1. Respondent, Department of Insurance (DOI) and Intervenor, Department of Banking and Finance (DBF) are state agencies charged with the regulation of insurance and banking activities, respectively.

2. Great Northern Insured Annuity Corporation (GNA) is an insurance company and agency operating in Florida

and elsewhere in space leased in financial institution lobbies, customer service areas and atriums. From its approximately eighty-four locations in Florida it markets annuities, securities and whole life insurance products.

Approximately one-third of its 1992 sales of $130 million was in annuities. GNA's principal profits in Florida are derived from its sale of annuities, which it directly underwrites and services.

3. First Nationwide Bank (FNB) leases space in its lobbies and other common areas to insurance agencies and companies, including Vista Financial Group, (Vista). In 1992 Vista sold approximately $13.5 million in annuities from the locations it leases from FNB.

4. First Union Mortgage Corporation (FUMC) is a financial institution with "grandfathered" insurance activities pursuant to section 626.988(5), F.S. It has also been granted a certificate of authority by DOI as a Third Party Administrator pursuant to section 626.88, F.S.

5. Florida Bankers Association (FBA) is a trade association of the banking industry in Florida. It represents its financial institution members.

6. The Association of Banks in Insurance Inc. (ABI) is a trade association of financial institutions and insurance companies.

7. The Florida Association of Life Underwriters (FALU) is a professional association of life, health and direct writer multi-line insurance agents with approximately 8,900 members.

8. James Mitchell and Co. and its subsidiary, JMC Insurance Services Corporation (JMC) are California corporations involved in marketing financial products, including annuities in Florida.

9. Florida Central Credit Union, Railroad and Industrial Federal Credit Union and GTE Federal Credit Union are state or federally chartered credit unions authorized to do business in Florida. Credit Union Services, Inc., a wholly owned subsidiary of GTE Federal Credit Union, sells insurance to credit union members.

10. The Florida Association of Insurance Agents (FAIA) is a trade association representing independent insurance agents in Florida.

11. Barnett Banks Trust Company, N.A. is a trustee for annuities issued by James Mitchell and Company. Barnett Banks Insurance, Inc. is a Florida licensed insurance company providing credit insurance of various types for credit extended by Barnett Banks throughout Florida. BTI Services, Inc. a subsidiary of Barnett, provides records administration services for insurers.

12. Marketing One, Inc., Liberty Securities Corporation and Compulife, Inc. market annuities to existing and prospective customers of financial institutions. Those marketing activities are conducted from lobbies, atriums or other central areas of the premises of the financial institutions.

13. The Financial Institutions Insurance Association is a California non-profit association of financial institutions and insurance companies with members in Florida who lease space to insurance agency tenants.

14. California Federal Bank is a federal savings bank operating branches in the State of Florida and leasing space to a company selling insurance in that space in bank branch offices.

The Statute

15. Although other sections of statutes are cited as "law implemented" in proposed Chapter 4-223, its undeniable focus is section 626.988, F.S., as described in the first rule of the proposed chapter:

> 4-223.001 Purpose. The purpose of these rules is to implement the provisions of Section 626.988,

> Florida Statutes, and to ensure that customers of financial institutions conduct their business in an atmosphere free from direct or indirect coercion, unfair competition, and unfair or deceptive trade practices, and to implement those statutory provisions which prohibt insurance agents and solicitors who are directly or indirectly associated with, under contract with, or controlled by a financial institution from engaging in insurance agency activities as an employee agent, principal, or agent of a financial institution agency. These rules establish procedures and standards for insurance companies, agencies, agents and solicitors in their relationships and business arrangements with financial institutions.

16. Embodied in Florida's insurance code, a code described as more lengthy than the New Testament, Section 626.988 F.S. enacted in 1974, ". . . generally prohibits banking institutions from engaging in insurance agency activities. . . ." *Florida Association of Insurance Agents, Inc. v. Board of Governors,* 591 F.2d 334 (U.S. 5th Cir. 1979).

The prohibition is accomplished indirectly by forbidding licensed insurance agents or solicitors from engaging in insurance agency activities under certain relationships with financial institutions. There are exceptions to the blanket prohibition, including an amendment in 1990 to permit state chartered banks to sell annuities in the event that federal law permits federal banks to sell annuities.

17. After almost twenty years of attempted enforcement, DOI has described section 626.988, F.S. as "a vague statute with imprecise standards". (Notice of proposed rule, Florida Administrative Weekly, June 26, 1992)

The Rules

18. DOI's experience with interpretation and enforcement of Section 626.988, F.S. commenced in earnest in the early 1980's, when insurance companies began to

market annuities in the lobbies or public access areas of financial institutions. Many of these companies consulted with the department and obtained guidance as to the applicability of the law to their varied circumstances.

19. In 1985, American Pioneer Life Insurance Company, through its counsel, Edward Kutter, Esquire, inquired of Commissioner Gunter concerning the effect of the law on its operations. American Pioneer Life Insurance Company was a wholly owned subsidiary of American Pioneer Savings Bank.

20. Donald Dowdell, General Counsel of the department, responded by letter dated November 18, 1985. He analyzed the relationships among the insurer, the financial institution, and the insurance agents and determined that there was no significant probability of the financial institution exercising control over the agents:

> . . . In view of the fact that American Pioneer Savings Bank is the ultimate parent of American Pioneer Life Insurance Company, the specific issue which must be resolved in responding to your inquiry is whether an independent agent appointed by American Pioneer Life is directly or indirectly associated with, or retained, controlled, or employed by American Pioneer Savings Bank. Absent such a relationship, Section 626.988 does not prevent American Pioneer Life and its agents from marketing insurance in this state.
>
> . . . These corporate relationships in and of themselves do not create a prohibited relationship between American Pioneer Savings Bank and independent insurance agents appointed by American Pioneer Life.
>
> . . . It is recognized that as the corporate parent, American Pioneer Savings Bank may influence or control various corporate activities of its subsidiaries which would not entail control of the solicitation, effectuation and servicing of coverage by insurance

agents. *If, in fact, American Pioneer Savings Bank does not directly or indirectly control the conduct of insurance activities by American Pioneer Life agents but, instead, the agents sell insurance free of influence from the financial institution, the prohibitions of the statute are inapplicable.*

(GNA Exhibit #8) (emphasis added)

Thus, in 1985, the department limited the prohibitions of section 626.988, F.S. to the financial institution's control of, and authority over, an agent's insurance activities.

21. By 1986, other aspects of an association became a concern of the department. Letters responding to inquiries outlined requirements that leased space and insurance sales literature be physically or visually separated from the functions of the financial institution. (GNA Exhibits #10, 13 and 16)

22. As a result of the body of opinions being circulated in the form of incipient policy, the department proposed rules implementing section 626.988. These proposed rules were later withdrawn before adoption, but the department continued to use them as guidelines.

23. During this period, DOI received a handful of complaints, mostly from agents. Douglas Shropshire, director of Agent and Agency Services during the relevant period, testified that he could not recall a single consumer complaint with respect to financial institutions engaging in the distribution of insurance products. Gail Connell, identified by Mr. Shropshire as "the Department's person most intimately familiar with field investigation of .988 issues" (Tr. at 760), agreed. (FUMC Exhibit #35, at 184-85 *See also.* FUMC Exhibit # 36 at 347-50, 353)

24. In 1991, in anticipation of the rule-making mandate of section 120.535, the department reviewed its guidelines. As a part of that review, representatives of

the agents' associations, FALU, FAIA and others, were consulted as to the desirability of the rules.

25. In January, 1992, DOI published proposed rules that were substantially similar to the guidelines.

Donald Dowdell stated that the proposed rules published at that time represented the department's determination of a reasonable interpretation of the statute, adding, "[T]he line was drawn with the realization of what was happening in the real world today. We could have—I think the statute prohibits an association, and as I indicated yesterday, if we had wanted to be Draconian about it and make life easier on ourselves, we could have attempted to prohibit any kind of association and see how that would have flown." (FUMC Exhibit #36 at 260-261)

The rules published in January of 1992 were withdrawn in order to permit the department to correct some perceived inadequacies in the economic impact statement.

26. The rules were presented at a workshop and were republished in June, 1992. The rules were virtually the same as those published in January. A public hearing was held July 12, 1992.

On October 6, 1992, DOI published a Notice of Change which materially altered Rules 4-223.003, .004, and .005. According to the Notice of Change, the change was in response to comments received at the public hearing held July 12. More specifically, the amendments were the result of the department's adoption of FALU's position in its petition challenging the June version of the rules. The amendments most significantly provided a definition of "associated" or "associate" and forbade insurance agents from occupying space virtually anywhere within the confines of a financial institution.

27. Mr. Shropshire drafted the amendment to Rules 4-223.003-.005. His source for the definition of "associate" was Webster's Dictionary.

Mr. Shorpshire testified that the modified proposal resulted from "explosive changes" in the number of banks involved in insurance in this state (Tr. at 793) and information which had come to his knowledge which indicated a need for a more restrictive rule. The two sources of information regarding insurance activities in Florida identified by Mr. Shropshire were the report prepared by investigator Ernest Ulrich in support of the economic impact statement and an ongoing investigation and prosecution of JMC for its marketing of annuities. Both sources predate or were contemporaneous to the June publication of the rules.

28. Mr. Shropshire's reason for the October change was the anticipated difficulty DOI faced in enforcing its rules as originally published. He stated, "So it was getting plain to us that we were going to have to very vigorously and closely and labor-intensively enforce the rule, if it was passed as it was promulgated in June of '92." (tr. at 808)

As described by Mr. Shropshire and others, the agency was concerned that insurance activities in financial institutions were not being conducted behind partitions, or even behind planters or other visual separations; and that bank agents were making referrals, taking telephone messages, and setting appointments for insurance agents who covered multiple bank branches on a "circuit-rider" system. Banks leasing space to agents also commonly paid bank employees a bonus for making appointments and referrals of customers to the agents.

29. DOI determined that these leasing arrangements established a strong connection between the bank and the agent, in effect wrapping the insurance program in the bank's colors and presenting it as another bank product. This, to DOI, justified the previously characterized "Draconian" measures.

The banks' and other witnesses freely described the economic advantage to a financial institution of having

insurance services available at the same location for its customers.

30. Additional amendments to the proposed rules were published in December 1992. Those amendments acknowledge or track the statutory exceptions to the section 626.988(2), F.S. prohibitions. The rules therefore do not apply to mortgage insurance business, credit unions, banks located in cities having a population of less than 5,000, and the sale of annuities when national banks have been authorized to sell such annuities.

During the course of the formal hearing, the agency proposed a final change to the rules at issue, clarifying that Chapter 4-223 does not apply to credit life and disability insurance and credit unemployment insurance. (American Banking Insurance Co. Exhibit #1)

The Economic Impact

31. Dr. Tim Lynch, Director for the Center for Economic Policy Analysis for Florida State University, conducted surveys, collected data and analyzed the economic impact of the June 1992 version of the proposed rules. He prepared the economic impact statement for DOI.

32. Dr. Lynch was consulted by the department about the October changes to the proposed rules and did additional analysis on the impact of the proposed changes. The economic impact statement prepared for the June publication was not amended, but Dr. Lynch's observations are found in his notes, or what he terms a "work in progress". He discussed those observations with department staff and considers the economic impact of prohibiting leases to be at least in the $ millions.

33. The agency did not republish an economic impact statement after the October changes, but plainly considered the impact of those changes as articulated by its consultant, Dr. Lynch.

34. Prohibiting the sale of annuities on bank premises would have a devastating effect on companies engaged in

that activity. Banks, also, would be affected, as they recognize a substantial benefit of providing their customers the convenience of an in-house service.

35. Although annuities are defined in Florida law as "life insurance" (See Section 364.602(1), F.S.) they are generally considered investments for future security rather than a cushion against loss.

On March 20, 1990, the Office of the Comptroller of the Currency (OCC) issued a formal approval letter stating, among other things, that under controlling Federal banking law, annuities are primarily financial investment instruments that national banks are permitted and authorized to sell. (GNA Exhibit #41) A follow-up letter to J. Thomas Caldwell as representative of the Florida Bankers Association specifically concluded that federally chartered banks in Florida were authorized to sell annuities. (GNA Exhibit #42)

36. The OCC conclusion with regard to the authority of national banks was upheld in *the Variable Annuity Life Insurance Co. v. Robert Clarke, et al.*, (VALIC) on November 22, 1991, by the U.S. District Court for the Southern District of Texas, Civil Action #H-91-1016, 786 F. Supp. 639. The case is pending on appeal before the U.S. Court of Appeals for the Fifth Circuit. (*Variable Annuity Life Insurance Company v. Clarke*, Case No. 92-2010) In the meantime, the OCC continues to issue opinion letters consistent with its earlier opinion. (See 5/10/93 letter filed as supplemental authority on 6/18/93)

37. National banks are presently selling annuities, and the impact of the October 1992 absolute prohibitions is nullified as to annuity products by the December 1992 amendments addressed in paragraph 30, above.

CONCLUSIONS OF LAW

38. The Division of Administrative Hearings has jurisdiction in this proceeding pursuant to sections 120.54(4) and 120.57(1), F.S.

39. As acknowledged by Respondent, the standing of all parties has been established by stipulation. (Respondent's proposed final order, p. 12, paragraph 2.)

40. Subsection 120.54(4)(a), F.S. provides:

> Any substantially affected person may seek an administrative determination of the invalidity of any proposed rule on the ground that the proposed rule is an invalid exercise of delegated legislative authority.

"Invalid exercise of delegated legislative authority" is defined in Section 120.52(8), F.S. as

> . . . action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one or more of the following apply:
>
> (a) The agency has materially failed to follow the applicable rulemaking procedures set forth in s. 120.54;
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(7);
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(7);
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency; or
>
> (e) The rule is arbitrary or capricious.

41. Petitioners have the burden of demonstrating by a preponderance of the evidence that the proposed rules constitute an invalid exercise of delegated legislative authority. *Adam Smith Enterprises, Inc. v. Florida Department of Environmental Regulation*, 553 So.2d 1260 (Fla. 1st DCA 1989).

42. In *Florida League of Cities v. Department of Environmental Regulation*, 603 So.2d 1363, 1370 (Fla. 1st DCA 1992), the First District Court clarified and simplified the standard of review a hearing officer applies to determine if a proposed rule policing the public interest constitutes an invalid delegation of legislative authority. The rules must be sustained as long as they are

> ". . . appropriate to the ends specified in the enabling legislation and that the requirements proposed therein [are] reasonably related to the purpose of the enabling legislation." *Id.*

43. *Florida League* discusses the evolution of common law and statutory criteria defining an invalid exercise of delegated legislative authority and makes clear that these criteria, with the exception of the material failure to follow rulemaking procedures, are grounded in the rational basis test. The court, reviewing a proposed rule challenge generally based on an invalid exercise of delegated legislative authority, states:

> Although the only explicitly stated ground under section 120.54(4)(a) for challenging a proposed rule is that the proposed rule constitutes an invalid exercise of delegated legislative authority, case law, beginning notably with *Agrico Chemical Co. v. Department of Environmental Regulation*, 365 So.2d 759, 763 (Fla. 1st DCA 1978), *cert. denied sub nom., Askew v. Agrico Chemical Co.*, 376 So.2d 74 (Fla. 1979), has engrafted specific criteria that must be applied in determining whether the rule or proposed rule complies with the enabling statute. The challenger, among other things, is required to show that the requirements of the rule are inappropriate to the ends specified in the legislative act, or that the requirements proposed are *not reasonably related* to the purpose of the enabling legislation, or that the proposed rule is arbitrary and capricious. [citations omitted] These criteria have since been

> codified by the 1987 legislature, amending section 120.52 by adding subsection (8) thereto, defining the term "invalid exercise of delegated legislative authority."

Id. at 1367 (emphasis added). Thus, the court treats the amended section as simply a codification of existing common law reasonableness factors.

44. The court noted the similarity between these common law factors in rule challenges at the administrative trial level and equal protection challenges in which the rational basis standard is applicable, stating that the "same factors" are used in both in Florida. *Id.* at 1367-68. The court cites language relied upon in *Agrico* that

> "[w]hen a commission promulgates a legislative regulation in the exercise of the police power designated to it by the legislature, it is subject to the same reasonableness and the basic facts justifying . . . the regulation as a statute." *Id.* at 1368.

The test for statutes in equal protection challenges where the rational basis standard applies is that

> "the constitutional requirement of equal protection does not inhibit the legislative power in securing the health, safety, morals, and general welfare of the public, and a classification enacted by the legislature for such purposes will not be annulled by the courts *unless it is wholly without a reasonable or practical basis, and therefore purely arbitrary.*" *Id.* (emphasis added).

45. The court further analogized these constitutional principles to the long-applied rule challenge principles in Florida. The court states:

> Indeed, the principle applied in rule challenge proceedings that *an agency's interpretation of a statute need not be the sole possible interpretation, or even the most desirable one but need only be within the*

> *range of possible interpretations,* [citations omitted] is merely a logical corollary of the rule often applied to determine the constitutional validity of the statute challenged on the ground that it offends the equal protection clause: that a statutory classification will not be invalidated under the rational basis test simply because it is not the best possible method, or the least burdensome for achieving the legislative purpose, or because there are other means available to obtain legitimate objectives. *Id.* at 1369 (emphasis added)

46. This most recent description of the appropriate standard in *Florida League* controls this proposed rule challenge proceeding. The legislature has determined that regulation of the insurance industry is necessary for the protection of the public welfare, and has granted DOI the authority to promulgate rules necessary to effectuate the statutes. Specifically, the department's authority is authorized in Section 624.308, Florida Statutes:

> (1) The department may adopt reasonable rules necessary to effect any of the statutory duties of the department. Such rules shall not extend, modify, or conflict with any law of this state or the reasonable implications of such laws.

The court in *Department of Insurance v. Insurance Services Office,* 434 So.2d 908, 910 (Fla. 1st DCA 1983), *rev. denied,* 444 So.2d 416 (Fla. 1984), classified this authority:

> Section 624.308(1) . . . is simply a *general grant of authority* to the Department to adopt reasonable rules necessary for the implementation of the Insurance Code with the further proviso that such rules as are promulgated by the Department may not extend, modify, or conflict with any law of this state or reasonable implications thereof. . . . [T]his is nothing more than a statement of what has always been the common law of the state. (Emphasis added.)

The legislature did not create a special standard for DOI rules and under *Florida League,* the reasonable basis standard would apply. This "highly deferential reasonable basis standard" requires the challenger to prove that the proposed rules are inappropriate to the ends specified in the enabling legislation and that the requirements therein are not reasonably related to the purpose of the enabling legislation. See *Department of Corrections v. Hargrove,* 615 So.2d 199, 201 (Fla. 1st DCA 1993) (reversing the invalidation of a proposed rule when the rule was reasonably related to the purpose of statute, and it was inappropriate for court or hearing officer to second-guess the agency).

47. Under the above-described standard some of the proposed rules are sustained; others must fail.

48. The legislature has made a public policy determination that separation of insurance activities and financial institutions is necessasy for the protection of the public welfare. Section 629.988, Florida Statutes, reflects this intent. Section 626.988(2) provides:

> No insurance agent or solicitor licensed by the Department of Insurance under the provisions of this chapter who is *associated with,* under contract with, retained by, owned or controlled by, to any degree, directly or indirectly, or employed by, a financial institution shall engage in insurance agency activities as an employee, officer, director, agent, of *associate* of a financial institution agency. (Emphasis added.)

This statute was recently unsuccessfully challenged on vagueness, equal protection, due process, unlawful delegation of legislative authority, and federal preemption grounds in *Glendale Federal Savings & Loan Association v. Department of Insurance,* 587 So.2d 534 (Fla. 1st DCA 1991), *rev. denied,* 599 So.2d 656 (Fla. 1992). In upholding the constitutionality of the statute, the court in *Glendale* identified the "legitimate state goals" behind the statute as being

"[c]oncerns regarding financial institutions' entry into insurance activities, including the *prevention of coercion, unfair trade practices, and undue concentration of resources.*" *Id.* at 536 n. 1 (emphasis added).

These are the goals that DOI seeks to achieve through its proposed rules.

49. Section 626.988, F.S., is not the only relevant law; other statutes form a crucial basis for the rules as well. The other statutory provisions that serve as a basis are summarized as follows:

Section 624.425, Florida Statutes, imposes certain resident agent and countersignature requirements for property, casualty, and surety insurance.

Section 624.428, Florida Statutes, provides that no life insurer may issue or deliver life and health insurance in this state unless the application is taken through and delivered by a licensed agent of Florida, but that this requirement does not apply to endorsements that do not involve a change in premium or payment of a commission.

Section 626.753, Florida Statutes, provides requirements for the sharing of commissions between licensed insurance agents and specifically prohibits the sharing of commissions between licensed agents and any corporation unless the corporation is an insurance agency.

Section 626.794, Florida Statutes, generally prohibits the sharing of commissions "directly or indirectly" between licensed life agents or life insurers and those who are not licensed agents.

Section 626.838, Florida Statutes, imposes restrictions on commission sharing by health insurance agents.

Section 626.9521, Florida Statutes, prohibits unfair methods of competition or deceptive acts or practices

and references the penalties for both willful and nonwillful violations.

Section 626.9541, Florida Statutes, defines unfair methods of competition and unfair or deceptive acts or practices. Some of the unfair methods specifically included are misrepresentations and false advertising of insurance policies; false information and advertising in general (including knowingly directly or indirectly placing such information before the public); and boycotting, coercion, and intimidation that result in an unreasonable restraint or monopoly in the business of insurance.

Section 626.9551, Florida Statutes, entitled "Favored agent or insurer; coercion of debtors" states that no person may be required to negotiate an insurance policy through a particular insurance agent or broker as a condition to receiving a loan or the extension of credit. Also, the lender may not unreasonably disapprove an insurance policy, require a separate charge for the handling of substitution of an insurance policy, or disclose or use information of an insurance requirement for real property to the detriment of the borrow and to the advantage of the lender.

Section 627.5515, Florida Statutes, establishes certain requirements for group life insurance policies issued or delivered outside the state, with certain exceptions.

Section 627.6515, Florida Statutes, establishes certain requirements for group, blanket, and franchise health insurance policies issued or delivered outside the state.

Rules' Purpose

50. The above statutory provisions, in perhaps a lesser degree than section 626.988, F.S., still relate to the prevention of coercion, unfair trade practices, and the undue

concentration of resources. As cited in paragraph #15 above, rule 4-223.001 states the purpose of the proposed rules.

51. These are the goals identified by the court in *Glendale* as legitmate state goals underlying Section 626.988. Since these same goals form the common theme of other statutory provisions implemented, rule 4-223.001 is rationally related to the enabling legislation.

Rules' Scope

52. Proposed rule 4-223.002 provides the scope of the rules, establishing procedures and standards for "all insurance companies, agencies, agents and solicitors licensed or authorized to do business in Florida or doing business in Florida" that have any relationships with any financial institutions regarding the providing, offering, selling, marketing, or making available of insurance to, or otherwise affecting, the customers of the financial institution.

53. The scope necessarily and reasonably encompasses the regulation of agents, solicitors, insurance companies, and insurance agencies in order for the agency to effectively implement the purposes of the enabling legislation. Section 626.988, F.S. specifically mentions "agents" and "solicitors". However, section 626.988 regulates the *relationship* between financial institutions and the agents and solicitors. This prohibited relationship encompasses more than solicitors and agents, because it focuses on financial institutions' entry into insurance *activities*. As stated in *Glendale*, the legislature was guarding against the dangers of financial institutions becoming involved in the business of insurance: the prevention of coercion, unfair trade practices, and undue concentration of resources.

54. Limiting the scope to agents and solicitors ignores the nature and definition of insurance agencies; if insurance agents are regulated by the rule, the agencies will

be regulted as well. Section 626.094, Florida Statutes, defines an insurance agency as a

> "business location at which an individual, firm, partnership, corporation, association, or other entity . . . engages in any activity which by law may be performed only by a licensed insurance agent or solicitor."

Similarly, insurance companies operate through agents and solicitors, so they too are affected by statutory regulations of the agents and solicitors. Although section 626.988 may be one of the principal statutes implemented, it is only part of the scheme of statutes, as summarized above, prohibiting coercion, unfair trade practices, and undue concentration of resources potentially caused by the financial institutions' entry into insurance activities. Section 626.9521 prohibits "any person" from engaging in deceptive practices. Therefore, section 626.9521 and the other provisions provide a broad base for the regulation of all the entities listed in the rules.

55. As stated in finding of fact #30, above, the scope of the rules was amended to clarify statutory exemptions. This language was added to proposed rule 4-223.002 after the December 4, 1992 order on motions for summary judgment:

. . .

> Notwithstanding the foregoing, Chapter 4-223 shall not apply to mortgage insurance business contemplated, expressly or by reasonable implication, by Chapter 627, Part XXI, Florida Statutes. To the extent required by Section 626.988(8), Florida Statutes Rule Chapter 4-223 applies to the sale of annuities by agents in association with financial institutions, only if no national bank has been authorized to sell one or more types of annuities other than as authorized by 12 U.S.C. 92, or having been authorized to sell such annuities, such authorization is revoked, repealed, rescinded, or otherwise terminated.

This language strikes at the heart of the issues raised by the various parties involved in the sale of annuities. Based on the prevailing authority and evidence presented by those parties, this language effectively removes the sale of annuities from the scope of the rules and therefore from the rules' proscriptions.

Definitions

56. Proposed Rule 4-223.003 contains the definitions for terms contained in the rules. The rule includes this significant definition of "associated" and "associate":

> (2) For purposes of this entire rule chapter and enforcement of Section 626.988, Florida Statutes, the Department interprets the terms "associated" and "associate" as those terms are used in Section 626.988, as meaning: *united in a relationship, or connected or joined together, or connected in mind or imagination.* Therefore, instances of prohibited associated include, but are not limited to, situations wherein an agent or solicitor, themselves or through their employer:
>
> (a) is in law or fact related or connected to the Financial Institution, as by formal or informal arrangement, contract, etc; or
>
> (b) *is or may reasonably be expected to be connected with the Financial Institution in the mind or imagination of the general public* using the Financial Institution's facilities, as a result of the agent or solicitor's presence or activities on Financial Institution premises, or other conduct or activities by the agent or solicitor or done with their consent. (Emphasis added.)

Aside from idiosyncratic grammer and the ambiguous use of an open-ended "etc.", this definition offends any

rational interpretation of section 626.988, F.S. and is thoroughly useless as a standard for the agency's enforcement of that and other relevant statutes. It is vague and incomprehensible, like beauty, an "association" lies in the eyes (or mind) of the beholder. The definition relegates to the mind or imagination of the general public the determination of what relationships are prohibited. This is a fragile basis for enforcement, as should be apparent to the agency by the fact that so few complaints have come from the general public. That such definition is unenforceable is obvious from the agency's pained attempts to craft its earlier guidelines and from its intelligent and highly regarded attorneys' inability to argiculate how it should be applied. (see generally, testimony of Dowdell and Shropshire) Proposed rule 4-223.003 violates section 120.52(8)(d), F.S.

57. The remainder of proposed rule 4-223.003, including that portion added in the December amendments simply reflects and refers to statutory definitions, and is appropriate.

Catalogue of Prohibited Associations

58. In contrast with the cosmic scope of the definition of "associate", the proscriptions of proposed rules 4-223.004 and .005 are specific, direct and unambiguous:

> 4-223.004 Prohibited Arrangements. No insurance agent or solicitor while in any Financial Institution atrium, Financial Institution office, Financial Institution lobby, Financial Institution foyer, Financial Institution board room, Financial Institution conference room, Financial Institution meeting room, Financial Institution customer service area, or other work area routinely utilized by Financial Institution staff and which is part of a Financial Institution's premises, or any location access to which will routinely have the agent's or solicitor's client passing through any of the preceding areas (except where

such passage is to or from a common elevator lobby as in and for the purpose stated in example 1 in rule 4-223.005 shall:

(1) Rent, lease, or otherwise occupy space for transacting insurance, or

(2) Meet with any persons or persons and in such meetings advise, counsel, provide information about, take applications, or assist in executing applications, regarding any aspect of insurance or any insurance produce, [sic] or

(3) Transact insurance business, or

(4) Advertise.

59. Proposed rule 4-223.005 contains allowable but restricted arrangements. Essentially, a financial institution may rent the upper floors to insurance agency and may be next door to an insurance agency as long as the two do not connect. If an insurance agency does rent space from a financial institution, the lease must be fixed and cannot be based on a percentage of income or otherwise tied to the transaction of insurance. There can be no common employees. The lease and all signs and sales literature must reflect the independence of the financial institution and agency according to specific requirements in the rule. In addition, the financial institution staff shall not answer the phone for or make appointments for the tenant agent. The financial institution may not perform administrative services or other functions customarily performed by an insurance agency in dealing with its customers. A lease in violation of this rule is deemed unlawful commission sharing and/or an unlawful association. The tenant insurance agency may sell insurance to the financial institution, however, in an arms-length transaction.

60. These provisions are a reasonable interpretation of the prohibitions of 626.988(2), F.S., which literally read, addresses insurance agency activities by an agent or solicitor acting as an employee, officer, director, agent, or associate of a financial institution agency. Section 626.988 (2), F.S. does not, as suggested by some testimony in this proceeding, forbid any and all associations between an agent and financial institution, but rather only those associations which promote or further the insurance agency activity. It does not, for example, forbid an agent from maintaining an account in a bank or selling a policy to a bank. But neither does it merely forbid those relationships comprising *control* by the financial institution.

61. Courts other than *Glendale* have addressed challenges to the statutory prohibitions of "associations" in myriad other contexts and have devised a reasonable meaning of the term:

> "In the absence of a statutory definition of 'association' the cases have adopted a common sense reading of the term that focuses on the business of the enterprise and the relationship of the defendant to that business."

United States v. Yonan, 800 F 2nd 164 (7th Cir. 1986) *cert. den.*, 479 US 1055 (1987), (construing "associated with" under federal criminal RICO statutes).

62. Factual predicate for these rules is found in the enforcement experience of the agency and the Petitioners' candid testimony that the current common practices described in findings of fact #28 and #29, above, significantly benefit both the agent and host bank; the relationship is symbiotic.

63. In the existence of a factual predicate, the rules at issue here are distinguished from the rules found unconstitutional in the supplemental authority supplied by Petitioners, *Edenfield v. Fane,* 113 S.Ct. 1792 (1993).

The U.S. Supreme Court in *Edenfield* struck as violating free speech guarantees of the First and Fourteenth

Amendments Florida's Board of Accountancy rule prohibiting direct, in-person, uninvited solicitation by CPAs.

The rules here, as in *Edenfield,* affect commercial speech, which speech enjoys a measure of constitutional protection.

> ". . . laws [and rules] restricting commercial speech, unlike laws burdening other forms of protected expression, need only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny." *Id.,* at 4432 (citations omitted)

The substantial state interest was described and upheld in *Glendale, supra.* The agency has demonstrated that the rules here further that substantial state interest. The agency's catalogue of activities proscribed by Section 626.988(2), F.S., is within its universe of available choices.

64. Petitioners argue that the above proposed rules impair existing contracts in violation of Article I, Section 10, Florida Constitution. This issue may be properly raised in the context of an enforcement action but these rules do not, on their face, impair existing contracts. A hypothetical determination that future enforcement might be unconstitutional is beyond the scope of this proceeding. *GTE Florida, Inc. v. Dept. of Transportation,* 12 FALR 1515, 1527-28 (DOAH order entered 3/8/90).

65. With a few exceptions, addresed below, the remainder of the proposed rules, 4-223.006 through 4-223-.011, are unchallenged except through the broad challenge to the agency's interpretation of "associate" or "associated". Nothing presented here justifies a wholesale invalidation of the entire rule chapter when that definition falls.

Rules Affecting "Grandfathered" and Third Party Administrator Status

66. Specific challenges to portions of the remaining rules are made by FUMC, the petitioner with "grandfathered" and Third Party Administrator status. (see finding of fact #4, above)

67. Section 626.988(5), F.S. allows financial institution agencies in operation on April 2, 1974 to continue to engage in insurance agency activities so long as they continue to function as constituted on April 2, 1974. The exemption is absolute:

> Notwithstanding *any provision* of this section, the Department of Insurance *shall permit the continued operation* under the same ownership and control of all financial institution agencies which were in existence and engaged in insurance agency activities as of April 2, 1974 . . . . (emphasis added)

DOI attempts to prohibit those grandfathered institutions from engaging in activities not prohibited by 626. 988, F.S. Rule 4-223.006(2)(d) provides in pertinent part:

> Only the licensed insurance agent shall solicit insurance; a financial institution which is not otherwise engaged in insurance agency activities through an affiliated agency pursuant to Section 626.988(5), Florida Statutes, may endorse an insurance product or an insurance company but shall not under any circumstances solicit insurance.

68. Endorsement is not an acivity prohibited to any financial institution pursuant to 626.988, or the rule would be an invalid exercise of delegated legislative authority permitting activity prohibited by the statute. Since section 626.988 does not prohibit endorsement by a financial institution no authority exists for prohibiting a grandfathered financial institution (exempt from the statute) from exercising those same rights and privileges.

69. Similarly, rule 4-223.006(2)(h)5.(i) imposes a restriction on grandfathered institutions not imposed on financial institutions as a whole by the statute:

> (i) Financial institutions *which are not otherwise engaged in insurance agency activities through an affiliated agency pursuant to Section 626.988(5), Florida Statutes,* may mail out advertising literature for the agent and insurance company in connection with insurance coverages, . . . (emphasis added)

Here again, that which is not prohibited by statute is prohibited to grandfathered institutions, without statutory justification.

70. DOI has also embellished the *conditions* for maintaining grandfathered status. Proposed rule 4-223.011(4)(a)3, provides:

> If the parent financial institution was not endorsing the insurance products solicited by the agency on April 2, 1974, or was not participating through endorsement or otherwise in the conduct of such solicitation, the financial institution is precluded from engaging in such activities.

71. Section 626.988(5), after granting the grandfather exemption, further directs how the exemption shall be administered by the Department:

> . . . To make possible such continuation, the Department of Insurance may license agents and solicitors who are otherwise qualified, as successors to those agents and solicitors who are exempt from the provisions of this section and their successors, for so long as the specified financial institution agency continues to function as constituted on April 2, 1974.

DOI has included *operations* of the parent financial institution within its area of inquiry for determining whether the *constitution* of the financial institution agency has changed since April 2, 1974.

"Constitute" as used in section 626.988(5), F.S. refers to the manner in which composite parts of the grandfathered financial institution were organized, owned, or interrelated as of April 2, 1974. DOI recognizes this in rule 4-223.011(3) and (4)(a)(1) and (2), which restrict changes in ownership, limit the grandfathered institution to the same number of agents with which the financial institution agency was constituted as of April 2, 1974, and require that the original or successor agents hold the exact type (kind) and class (line) of licenses to which the grandfathered agents had been appointed. In this context, the limitation of the activities of a related financial institution in 4-223.011(4)(a)3, stands out as a legal *non sequitur*. The rule enlarges its law implemented.

72. "As constituted" means that the organization and ownership of the grandfathered entity remain the same. Grandfather rights are not transferrable to another organization. The grandfathered license or successor, however, cannot be restricted from exercising the same rights as any other person holding the same type of license. What is grandfathered is the right to hold the license in a financial institution agency that is functionally organized in substantially the same manner as it was at the time the statute was enacted. The statute does not give DOI the right to limit the scope of the license by restricting the type of business that can be performed by the agent.

This is particularly significant in light of a definition added in the October, 1992, Notice of Change. Rule 4-223.003(3) provides this definition of "Financial Institution":

> As used in this rule chapter, the phrases "Financial Institution" and "Financial Institution staff" include all entities and their staff which are members of the same holding company group as the Financial Institution is a member of [sic], or are otherwise affili-

ated with the Financial Institution by common ownership or control.

By defining as staff of that agency all employees of any member of a bank holding company which holds a grandfathered financial institution agency, DOI extends the prohibitions against mailing advertisements and against endorsement which DOI has imposed on grandfathered financial institution agencies (albeit without legislative authority to do so) to nongrandfathered financial institutions which DOI otherwise recognizes are not prohibited by statute from endorsing insurance products.

73. Rule 4-223.011(4)(c) provides:

> A financial institution or financial institution agency is prohibited from acting as a Third Party Administrator unless a financial institution agency was engaged in such activities as of April 2, 1974.

DOI cites section 626.988 and section 626.88, F.S. as statutory authority. Neither prohibits financial institutions or financial institution agencies from acting as Third Party Administrators. DOI has expanded and modified both statutes to prohibit an activity nowhere proscribed by statute.

Section 626.88 defines "administrator", in pertinent part, as:

> (1) For the purposes of this part, an administrator is any person who directly or indirectly solicits or effects coverage of, collects charges or premiums from, or adjusts or settles claims on residents of this state in connection with authorized commercial self-insurance funds or with insure or self-insured programs which provide life or health insurance coverage or coverage of any other expenses described in s. 624.33(1), *other than any of the following persons:*
>
> * * *

> (c) an insurance company which is either authorized to transact insurance in this state or is acting as an insurer with respect to a policy lawfully issued and delivered by such company in and pursuant to the laws of a state in which the insurer was authorized to transact an insurance business.
>
> * * *
>
> (e) An insurance agent licensed in this state whose activities are limited exclusively to the sale of insurance.
>
> * * *
>
> (emphasis added)

74. Section 626.988 prohibits insurance agents or solicitors associated with financial institutions from engaging in insurance activities. It does not prohibit administrators from engaging in insurance activities as an associate of financal institution. Moreover, the definition of administrator, set forth above, distinguishes an "administrator" from an agent or insurance company.

Nothing in the Third Party Administrator statute (Chapter 626, Part VII, Florida Statutes) precludes a financial institution from being certified as a Third-Party Administrator. Nothing in section 626.988 addresses Third-Party Administrators. Notably, section 626.988 was enacted in 1974. Chapter 626, Part VII, was enacted in 1984. The legislature was aware of the purported dangers of affiliation and could have excluded financial institutions from the field of third-party administrators had it wished to do so. Instead the legislature apparently decided that a financial institution's operation as a Third-Party Administrator posed no threat of coercion, unfair competition or undue concentration of economic resources.

Single Subject Requirement

75. Section 120.54(8), F.S., requires that ". . . [e]ach rule adopted shall contain only one subject. . .".

In *Humhosco, Inc. v. Department of Health & Rehabilitative Services*, 476 So. 2d 258 (Fla. 1st DCA 1985), the court affirmed a hearing officer's determination that a rule did not violate section 120.54(8), Florida Statutes, the single subject requirement. The challenger asserted that the rule containing the general definitions also impermissibly contained a section that clarified the relationship between the proposed rule and adopted rules. Upholding the hearing officer's determination of validity, the court stated:

> The hearing officer agreed . . . that the addition of [the section] did not violate the single-subject rule since it *logically falls* within the general definitions and provisions set forth in the [rule]. We likewise conclude that [the section] is *facially consistent with the subject matter and purpose* of [the rule].
>
> *Id.* at 262 (emphasis added)

Petitioners' challenge in this proceeding must also fail. The subject matter of the rules at issue here logically relates to the purpose of establishing procedures and standards for insurance companies, agencies, agents and solicitors in their relationhips and business arrangement with financial institutions, as stated in proposed rule 4-223.001.

The Economic Impact Statement (EIS)

76. Section 120.54(2), F.S. (1992) provides in pertinent part:

* * *

> (b) Prior to the adoption, amendment, or repeal of any rule not described in subsection (9), an agency may provide information on its proposed action by preparing an economic impact statement, and must prepare an economic impact statement if:
>
> 1. The agency determines that the proposed action would result in a substantial increase in costs or

> prices paid by consumers, individual industries, or state or local government agencies, or would result in significant adverse effects on competition, employment, investment, productivity, or innovation, and alternative approaches to the regulatory objective exist and are not precluded by law; or
>
> 2. Within 14 days after the date of publication of the notice provided pursuant to paragraph (1)(c) or, if no notice of rule development is provided, within 21 days after the notice required by paragraphs (1)(a) and (b), a written request for preparation of an economic impact statement is filed with the appropriate agency by the Governor, a body corporate and politic, at least 100 people signing a request, or an organization representing at least 100 persons, or any domestic nonprofit corporation or association.
>
> An agency's determination regarding preparation of an economic impact statement pursuant to subparagraph (2)(b)1, shall not be subject to challenge.
>
> * * *
>
> (d) No rule shall be declared invalid based on a challenge to the economic impact statement for the rule unless the issue is raised in an administrative proceeding within 1 year of the effective date of the rule to which the statement applies. No person shall have standing to challenge an agency rule, based upon an economic impact statement or lack thereof, unless that person requested preparation of an economic impact statement under subparagraph (2)(b)2, and provided the agency with information sufficient to make the agency aware of specific concerns regarding the economic impact of the proposed rule, by either participation in a public workshop, public hearing, or by submission of written comments, regarding the rule. The grounds for invalidation of a rule based upon a challenge to the economic impact

statement for the rule are limited to an agency's failure to adhere to the procedure for preparation of an economic impact statement provided by this section, or an agency's failure to consider information submitted to the agency regarding specific concerns about the economic impact of a proposed rule when such failure substantially impairs the fairness of the rulemaking proceeding.

77. Effective July 1, 1992, an agency is no longer required to prepare an EIS for every proposed rule (Chapter 92-166, subsection 4, 12, Laws of Florida).

The agency prepared an appropriate detailed EIS when the June 1992 version of the rules was published. For the October version it did not consider that the requirements of Section 120.54(2)(b)1. F.S. were met. In addition, no EIS was requested for the October 1992 version.

78. In fact, the agency's consultant, Dr. Lynch, continued to compile information on the affect of the October amendments and discussed that information with agency staff. The fact that his findings are in a "work in progress" rather than a final formal EIS does not detract from the agency's proper consideration of the impact of the amendments.

The agency has not violated section 120.52(8)(a), F.S. or "materially failed to follow the applicable rulemaking procedures set forth in Section 120.54".

ORDER

Based on the foregoing, the following proposed rules are determined to be invalid: 4-223.003(2); 4-223.006 (2)(d); 4-223.006(2)(h)5.(i); 4-223.011(4)(a)3.; and 4-223.011(4)(c).

DONE AND ORDERED this *30th* day of July, 1993, in Tallahassee, Florida.

/s/ Mary Clark
MARY CLARK
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the Division of Administrative Hearings this *30th* day of July, 1993.

APPENDIX

Pursuant to Section 120.59(2), F.S., the following constitute specific rulings on the findings of fact proposed by the parties:

Findings of Fact Proposed by GNA and FNB

1.-3. Adopted in paragraph 2.

4.-8. Rejected as irrelevant, immaterial or unnecessary.

9.-10. Adopted in paragraph 2.

11. Adopted in substance in paragraph 35.

12.-14. Rejected as irrelevant, immaterial or unnecessary.

APPENDIX B

Legislative History of § 626.988. House Bill submitted by Representative Brown and others. State of Florida Archives, Series 19, Carton 186.

By Representatives Drove and others

A bill to be entitled

An act relating to insurance; creating § 626.988, Florida Statutes; prohibiting insurance agents and solicitors associated with certain financial institutions from soliciting, negotiating, selling, effectuating or servicing any policy of insurance; providing exceptions with respect to certain types of insurance and certain agents and solicitors so engaged on April 2, 1974; providing an effective date.

WHEREAS, there is now pending before the Board of Governors of the Federal Reserve System various applications by bank holding companies to engage in the insurance agency business, and

WHEREAS, an administrative law judge has prepared a recommended decision for consideration by the Federal Reserve Board which enumerates the anticipated adverse effects on the public of the entry of bank holding companies into insurance agency activities, but recommends that the applicants to be authorized to engage in such activities in a limited manner and subject to various restrictions, and

WHEREAS, after hearing an exhaustive presentation of evidence, the administrative law judge reached various conclusions concerning the bank holding company applicants, among them are the following:

a) ". . . [T]he entry of large banking institutions into the insurance agency business in areas where the banks have a large concentration of

resources would result in the demise of small insurance agencies or their transformation into large combinations. This would decrease competition within the insurance industry and reduce the opportunity for youths, veterans and women to gain a foothold in a business in which ultimately they could participate as owners or managers."

b) ". . . [W]hile there is a minor convenience in bank affiliated insurance agency sales in the case of personal lines such as automobile and homeowner's coverages, the convenience advantage in the case of commercial financing—insurance appears insignificant."

c) ". . . [I]t appears that the gains in efficiency [by] the bank affiliated insurance agencies will largely benefit the applicants in terms of larger-scale operating economies," and "Based upon their record of maximum charges for credit life insurance it is not reasonable to expect that the applicants will voluntarily lower premiums in other fields of insurance."

d) ". . . [W]hile it is difficult to accurately measure the psychology of voluntary tieing, nevertheless the weight of evidence realistically evaluated suggests that in times of scarcity of lending funds, the average borrower finds himself in a weakened bargaining position vis-a-vis the lender and the offer of insurance placement is another device along with compensating balances and utilization of other banking services with which the borrower can increase the probability that a needed loan will be granted."

e) ". . . [S]ince banks are predominantly the depositaries of 'other peoples' money, 'therefore they should not be in competition with their depositors,"

and,

* * *

WHEREAS, the undue concentration of economic resources, a substantial decrease in competition among insurance agents, unfair competition, conflicts of interest and voluntary tieing are against the public policy of the state and against the best interests of the people of Florida, and

WHEREAS, other financial institutions which enter insurance agency activities will cause the same results as the entry of bank holding companies into such activities, and

WHEREAS, the United States Congress by the Federal Bank Holding Act of 1956, 12 USCA § 1846, specifically reserved to the states the power and authority to enact legislation with respect to bank holding companies, and

WHEREAS, to preserve the public policy and protect the public interest insurance agents and solicitors should be prohibited from soliciting, negotiating and selling insurance contracts if employed by, associated or affiliated in any way with specified institutions. NOW THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 626.988, Florida Statutes, is created to read 626.988 Financial institutions; agents and solicitors prohibited from employment; exceptions.—

(1) For the purpose of this section the following definitions shall apply:

(a) "Financial institution" means any bank, bank holding company, savings and loan association, savings and loan association holding company, savings and loan association service corporation, and any subsidiary, affiliate, employees' trust or foundation of any of the foregoing. [insert amendment #3 here] Specifically excluded from this definition in any bank which is not a subsidiary or

affiliate of a bank holding company and is located in a city having a population of less than 5,000 according to the last preceding census.

(b) "Insurance agency activities" means the procurement of applications, solicitation, negotiation, selling, effectuating or servicing of any policy or contract of insurance other than credit life insurance and credit disability insurance.

(c) "Financial institution agency" means any person, firm, partnership or corporate entity which is engaged in insurance agency activities, as herein defined, and is associated with, owned, controlled, employed or retained by a financial institution as herein defined.

(2) No insurance agent or solicitor licensed by the department of insurance under the provisions of Chapter 626, Florida Statutes, who is associated with, under contract with, retained by, or owned or controlled to any degree directly, or indirectly, or who is employed by a financial institution shall engage in insurance agency activities as an employee, officer, director, agent or associate of a financial institution agency.

(3) The department of insurance shall not grant, renew, continue or permit to exist any license as such agent or solicitor as to any applicant therefor or licensee thereunder if it finds that the license has been or is being or will probably be used by the applicant or licensee for any purpose prohibited by this section.

(4) Notwithstanding any provision of this section the department of insurance shall permit the continued operation under the same ownership and control of all financial institution agencies which were in existence and engaged in insurance agency activities as of April 2, 1974. To make possible such continuation the department of insurance may license agents and solicitors who are otherwise qualified, as successors to those agents and solicitors who are exempt from the provisions of this section, and their

successors, for so long as the specified financial institution agency continues to function as it was constituted on April 2, 1974; provided, however, that no agent or solicitor so licensed under this section shall be permitted to be employed, or controlled to any degree, directly, or indirectly, by any financial institution agency except the particular agency for which he was so licensed as a successor for the purposes of this section.

(5) This section shall not prevent an agent or solicitor from serving as an officer or director of a financial institution, provided that he conducts all of his insurance activities free of ownership or control of the financial institution, and, provided further that the financial institution does not participate directly or indirectly in the earnings from his insurance activities.

(6) This section shall not apply to agents or solicitors who were engaged as of April 2, 1974, in activities prohibited by this section and who have been continuously so engaged since that date, but only with respect to the specific type of license held and the financial institution with which the agent or solicitor was associated on said date.

Section 2. This act shall take effect upon becoming a law.

LEGISLATIVE SUMMARY

Provides that no insurance agent or solicitor associated with, under contract with, retained by or owned or controlled by a financial institution shall engage in insurance agency activities. Provides that the department of insurance shall not grant, renew or permit any license to such agent. Provides that the department of insurance shall allow the continued operation under the same ownership and control of all financial institution agencies which were in existence and engaged in insurance agency activities as of January 1, 1974. Provides that an insurance agent or solicitor may act as a director or officer of a financial institution provided his insurance activities are separate from the financial institution. Exempts agents or solicitors engaged in prohibited activities prior to January 1, 1974 and continuously so engaged since that date.